



Legal Update

February 2018

The SJC holds that a driver's consent for police to search "in the vehicle" for firearms and narcotics was limited to the vehicle's passenger compartment and trunk, but did not include searching under the hood and removing the air filter.

Commonwealth v. George Ortiz, SJC-12273 (2018):

The Supreme Judicial Court held that the Defendant voluntarily consented to the search of his car when he responded to the officer's question asking him if there was **"anything in the vehicle that the police should know about"** by stating: **"No, you can check."** The standard for measuring the scope of a suspect's consent is objective reasonableness. That is, what would the typical reasonable person have understood by the exchange between the officer and the Defendant? The Court found that the Defendant limited the search to the interior of his vehicle, including the trunk, and containers within those areas where narcotics and firearms could reasonably be found. Any ambiguity about the scope of the Defendant's consent permitting a search under the hood of the car should have been resolved by the police asking clarifying questions.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.

On January 23, 2015, Holyoke police officers stopped a vehicle for violating a city ordinance which prohibits playing excessively loud music in a motor vehicle. As the officers approached the vehicle, they recognized the Defendant from prior incidents which included breaking into an apartment and attempted murder with narcotics and firearms offenses. The officers also recognized one of the two passengers, George Ortiz, who had been arrested for trafficking in cocaine after the execution of a search warrant.

When the officer asked the Defendant for his license and registration, he provided a Massachusetts identification card that was not a driver's license. Neither of the passengers had a driver's license. One of the officers asked the Defendant if there was anything in the vehicle that the police should know about, including narcotics or firearms. The Defendant responded without hesitation: "No, you can check." The officers ordered the Defendant and the passengers out of the vehicle and placed all three in handcuffs. Police frisked the Defendant and passengers and did not find any weapons.

When more police officers arrived, including a K-9 unit, the dog did not alert the handler to anything around the vehicle. The officers searched inside the motor vehicle and proceeded to check under vehicle's hood. The police found a black bag containing two (2) firearms after removing the air filter. During the course of this search, the Defendant was standing to the side of the road and never objected to the search.

The defendant and the two passengers were arrested and transported to a police station. At the station, the Defendant admitted that the firearms found in the vehicle belonged to him and that he gave consent to the officers to look in his vehicle. The Defendant filed a motion to suppress the firearms and his statements. The Commonwealth conceded that the search of the motor vehicle was based solely on the Defendant's consent. The police did not regard the search as an inventory search nor did they believe that they had grounds to search the vehicle without a warrant.

The judge allowed the motion and found that the Defendant had given his free and voluntary consent to the search, but the scope of the consent was limited to a search for narcotics or firearms in the interior of the vehicle and did not include a search "under the hood beneath the air filter." The judge found that a typical reasonable person interpreting the verbal exchange between the police and the defendant "would believe that the defendant was limiting the scope of the search to the cabin of the vehicle." The judge also found that the Defendant's silence when the officer expanded the scope of the search by directing the other officers to search "under the hood" was nothing more than the Defendant's "mere acquiescence to a claim of lawful authority," and therefore did not expand the scope of his initial consent. The Defendant's statements were suppressed as "fruits of the poisonous tree."

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- ISSUE:** Did the police exceed the scope of the Defendant's consent by searching beneath the hood of the vehicle?
- CONCLUSION:** The SJC held that police exceeded the scope of the Defendant's consent and that any ambiguity regarding the scope of the consent to search should have been resolved by the police asking clarifying questions.

Since the voluntariness of the defendant's consent was not an issue, the SJC focused on whether the police exceeded the scope of the search when they looked under the hood for firearms and narcotics. The SJC has previously found that a search that is based on consent may not exceed the scope of that consent. *Commonwealth v. Cantalupo*, 380 Mass. 173, 178 (1980). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Commonwealth v. Gaynor*, 443 Mass. 245, 255 (2005).

The standard is what a typical reasonable person would understand the scope of the consent to be, based on the words spoken and the context in which they are spoken, not on what a police officer may understand as the places in a vehicle where narcotics or firearms may be hidden. Consequently, the fact that the police in this case knew from investigative experience that persons sometimes hide firearms and narcotics inside the air filter of a vehicle is irrelevant to a reasonable person's understanding of the scope of the driver's consent.

The police specifically asked the Defendant if there was anything in the vehicle that the police should know about, including narcotics and firearms, to which the Defendant responded, "No, you can check." These words limited the scope of the Defendant's consent to a search for narcotics and firearms inside the vehicle, which includes the passenger compartment, trunk, and containers within those areas where narcotics and firearms could reasonably be found.

Even if the Defendant's consent was ambiguous, police are not allowed to take advantage of such ambiguity, but should ask questions that clarify the ambiguity. **The voluntariness of consent to a search must be unambiguous.** *Commonwealth v. Carr*, 458 Mass. 295, 299 (2010). "If either the officer's request or the [person's] response is so ambiguous that we are unable to discern whether the [person] voluntarily consented to [the search], our inquiry will be over and the [search] must be deemed unlawful." *Carr, supra*. **If clarity is required when determining the voluntariness of consent, the same clarity should apply to the scope of that consent.**

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Here, the Defendant gave consent to the police to search inside his vehicle, but did not with reasonable clarity give the police consent to search beneath the hood or to dismantle the air filter as part of that search. Under the Fourth Amendment and art. 14, unless it is reasonably clear that the consent to search extends beyond the interior of the vehicle, the police must obtain explicit consent before a vehicular search may extend beneath the hood. Moreover, where such consent is not reasonably clear at the outset, the defendant's silence when the police open the hood cannot be an adequate substitute for consent.

Based on the facts of this case, the Defendant's silence, while he was in handcuffs and had been removed to the side of the street, was nothing more than "mere acquiescence to a claim of lawful authority." Furthermore, the Defendant's failure to revoke his consent cannot be construed as consent to expand the scope of the search beyond the scope to which he had initially consented.

Commentary: In a dissenting opinion, some of the justices interpreted the statement that the police can search in the vehicle to mean "anywhere in the vehicle." Based on this case, when receiving consent to search, make sure there is no ambiguity otherwise it is likely to be challenged.

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